

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF PITKIN
STATE OF COLORADO
Criminal Action No. C-1616

THE PEOPLE OF THE)	
STATE OF COLORADO,)	
)	
Plaintiff,)	
)	
)	MEMORANDUM OPINION
vs.)	
)	
THEODORE ROBERT BUNDY,)	
)	
Defendant.)	

On September 7, 1977, the People filed a Notice Of Intent to Introduce Additional Similar Transactions relating to the disappearance of Debra Kent and to the disappearance and death of Laura Ann Aime. On September 13, 1977, defendant filed a Supplement to Motion in Limine and on September 14, 1977, filed a Motion to Strike District Attorney's Notice of Intent to Introduce Additional Similar Transactions. These motions are directed to an effort to obtain a pre-trial determination of the admissibility of evidence as to the Kent and Aime transactions. The parties agreed in open court to have the Court make such a determination based upon an offer of proof to be made by the District Attorney. On October 21, 1977, a written offer of proof was made. Briefs were filed and, on November 2, 1977, oral argument was heard. Defendant appeared pro se with his advisory counsel Kenneth Dresner, Esq. and Kevin O'Reilly, Esq. The People were represented by Milton Blakey, Esq., Deputy District Attorney.

The Court has considered the offer of proof and has considered the briefs and argument of defendant and counsel directed thereto, and on the basis thereof issues the following memorandum opinion.

The general rule with respect to the use of evidence of alleged similar transactions in a criminal trial is stated in

Warford, et al. v. People, 43 Colo. 107, 96 P. 556 (1908), at page

112:

"The general rule is, that evidence is not admissible which shows, or tends to show, that the accused has committed a crime wholly independent of the offense for which he is on trial. The reason for the rule is that no person shall be convicted of an offense by proving that he is guilty of another. Evidence of such character creates a prejudice in the minds of the jury against the accused, and the rule should, therefore, be strictly enforced in all cases where applicable."

There are exceptions to the general rule. Although evidence of similar transactions cannot be used to show a defendant's bad character or propensity to crime in order to show that he is likely to have committed the crime charged (Stull v. People, 140 Colo. 278, 344 P.2d 455 (1959)), similar transactions sometimes are admissible in establishing particular facts in issue. See Stull v. People, supra.

In this case, the District Attorney seeks to utilize such evidence to assist in proving that the defendant was the person who committed the offense charged, that the modus operandi employed was so similar as to evidence that the same person committed the crime charged and the alleged similar transactions and that the offense charged and the alleged similar transactions were part of a common plan, scheme or design. These purposes are directed to the issues of identity of the perpetrator and intent. In appropriate cases, evidence of similar transactions is admissible for such purposes. See McCormack on Evidence, 2nd Ed., Sec. 190; see People v. Hosier, 186 Colo. 116, 525 P.2d 1161 (1974); People v. Henderson, ____ C.A.____, 559 P.2d 1108 (1977).

Evidence of an alleged similar transaction is admissible only if it is first shown that the defendant was the actor (People v. Hosier, supra) and that the transaction was truly similar to the

offense charged. (Webb v. People, 97 Colo. 262, 49 P.2d 381 (1935); People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974)).* Such facts need not be shown beyond a reasonable doubt but must be shown by substantial evidence. See McCormack on Evidence, Second Ed. Sec. 190 p. 452. Once these matters are shown, the Court must balance the relevance and probative value of the evidence of a similar transaction against the possible prejudice. This is a task requiring exercise of the Court's informed discretion. In People v. Ihme, 187 Colo. 48, 528 P.2d 380 (1974), it was said, at p. 51:

"The trial judge must weigh the degree to which the two transactions are similar, the bearing of the other transaction on the issues presented at the trial of the offense charged, and the degree to which the jury would be prejudiced by the other transaction. Because of these varying considerations, the trial judge is allowed substantial discretion when he decides regarding the admissibility of such evidence. Clews v. People, 151 Colo. 219, 377 P.2d 125 (1962); Perry v. People, 116 Colo. 440, 181 P.2d 439 (1947)."

In McCormack on Evidence, Second Ed. Sec. 190 at p. 452,

it is said:

"...courts are stricter in applying these standards of relevancy when the ultimate purpose of the state is to prove identity, or the doing by the accused of the criminal act charged than they are when the evidence is offered on the ultimate issue of knowledge, intent or other state of mind."

The Kent and Aime transactions must be analyzed against the foregoing legal framework.

Reference is made to the offer of proof for the alleged facts upon which the People rely to establish the similarity of the Aime and Kent transactions to the Campbell transaction. Reference is made to the transcript of the preliminary hearing with respect to the nature of the Campbell transaction.

Comparison of Kent and Campbell Transactions; Connection of Defendant:

Debra Kent disappeared November 8, 1974, about 10:30 p.m.

outside a high school auditorium in Bountiful, Utah while a play was

*Clews v. People, 151 Colo. 219,
377 P.2d 125 (1962)

in progress. Caryn Campbell disappeared January 12, 1975 about 8:00 p.m. from a lodge at Snowmass Resort in Pitkin County, Colorado..

Kent is 17 years of age, 5'1" tall and weighs 110 pounds. She has an oval face and when she disappeared had long brown hair, parted in the middle. Campbell was 23 years of age, 5'5" tall and 100 pounds. She had an oval face and long brown hair, parted in the middle.

Kent wore white pants, a blue sweater with flowered design and a blue Ike jacket when she disappeared. Campbell wore a blue flowered blouse, blue jeans with flare legs, brown boots and a heavy wool collar when she disappeared.

The manner of Kent's disappearance is unknown. She left the auditorium at her parents' direction to go to a car in a parking lot and to pick up her brothers at another location. The car was not moved by her. Loud frightened female screams and loud bangs were heard in the area of the school by residents in the neighborhood about the time of her disappearance. The manner of Campbell's disappearance is unknown. She left the lobby of the Wildwood Inn to go to her second floor room to obtain a magazine, and disappeared. There were many occupants of the lodge at the time and no report of any outcry or disturbance was made, notwithstanding extensive questioning of many of those occupants by law enforcement authorities.

Kent's present situation is unknown. She has never been found, alive or dead. The offer of proof shows no reason to believe that she might have run away. Campbell's body was found on February 17, 1975 on a back road near Snowmass Resort. Autopsy revealed that her death occurred shortly after her disappearance on January 12, 1975.

The effort to connect defendant with the Kent transaction is predicated upon witnesses who place him at the auditorium on the night of her disappearance. (For the purpose of this opinion, the reliability

of those identifications will not be questioned). One woman, of unspecified age and appearance, was approached twice at the auditorium during the course of the evening by a person she identifies as the defendant and was asked to come with him to identify a car. She declined on both occasions. Another woman, of unspecified age and appearance, was approached once at the auditorium that evening by a man who asked her to come with him to help start his car. The offer of proof does not state that this woman would positively identify the defendant. A 17 year old girl identifies the defendant as a person who was hanging around in the back of the auditorium during the evening. The woman who was approached twice says that she saw the defendant about 10:40 p.m. in the back of the auditorium, breathing heavily, with his hair messed up and visibly upset. He sat down opposite her and her husband and left shortly thereafter at curtain call. The offer of proof does not place defendant in Kent's company at any time during the evening. The offer of proof does not reflect that defendant was acquainted with Kent; the evidence does not reflect that defendant was acquainted with Campbell.

The People implicitly urge that it may be assumed that the person who tried to induce the two women to leave the auditorium to assist in identification or repair of a car was the same person who was the actor in the Kent transaction. There is no more than suspicion to support that assumption, and of course it has not been conclusively established that Kent was the victim of any crime. There is every reason to believe that Kent left the auditorium voluntarily for her own purposes, and it is only speculation that any ruse was employed by anyone to entice her from her path to her automobile. If a ruse was employed, it was not effective or not effective for long if it can be inferred that the screams were from Kent. Thus, there is nothing but suspicion to suggest a modus operandi

common to the Kent situation and that of the witnesses who were asked to come out to identify or assist in repair of a car. There is nothing but suspicion to suggest that defendant had any relation to the Kent transaction.

It is concluded that the similarities between the Kent and Campbell transactions are not sufficient and that evidence of connection of the defendant to the Kent transaction is not sufficient. The introduction of evidence of the Kent transaction would be highly prejudicial to the defendant. Such evidence cannot be admitted under these circumstances.

Comparison of Aime and Campbell Transactions; Connection of Defendant to Aime Transaction:

Laura Ann Aime disappeared October 31, 1974, about midnight. She left a party near Salt Lake City, Utah, at that time with the expressed intent of hitchhiking to American Fork. Whether she was abducted on that evening or thereafter is not known. Caryn Campbell disappeared January 12, 1975 about 8:00 p.m. from a lodge at Snowmass Resort in Pitkin County, Colorado.

Aime was 16 to 18 years of age, 5'10" in height and weighed 110 to 120 pounds. She had dark brown hair, 15" to 17" in length, parted in the middle. Campbell was 23 years of age, 5'5" tall and weighed 100 pounds. She had long brown hair, parted in the middle.

Aime wore a halter top and blue Levis with patches on the seat at the time of her disappearance. Campbell wore a blue flowered blouse, blue jeans with flare legs, brown boots and a heavy wool coat.

The manner of Aime's disappearance is unknown. The manner of Campbell's disappearance is also unknown. Campbell left the lobby of the Wildwood Inn to go to her second floor room to obtain a magazine and disappeared.

Aime's body was found on Thanksgiving day in 1974 in American

Fork Canyon, a mountainous area outside Salt Lake City. The body was nude except for a necklace and a ring, and a nylon was found tied around her neck. Campbell's body was found on February 15, 1975 on a back road near Snowmass Resort. The body was nude except for gold loop earrings. No clothing was found in the vicinity of either of the bodies.

Autopsy revealed that Aime had experienced a skull fracture, strangulation, ten scalp lacerations and other severe injuries about the head and neck. Campbell experienced a skull fracture and three significant scalp lacerations. Defendant's counsel represented in argument, without objection by the People, that the autopsy showed Aime died approximately seven days before her body was found, so that she would have been missing more than two weeks before her death. Autopsy showed that Campbell's death had occurred within hours after her disappearance on January 12, 1975.

Sperm was found in both the anus and vagina of Aime. Campbell's autopsy was positive for evidence of a vaginal sex act but negative with respect to an anal sex act. The tests on Campbell were consistent with an act of sexual intercourse with her fiance which occurred less than 24 hours preceeding her death.

The only matter in the offer of proof connecting defendant in any way with Aime is that he was acquainted with her, had frequented a cafe frequented by Aime and her friends, had engaged in conversations with Aime, had exhibited an interest in her, and, in a restaurant, and apparently in banter, had at one time stated an intention to rape her. There is no indication that defendant was in the company of Aime at any time shortly before or at any time after her disappearance.

It is concluded that the similarities between the Aime and Campbell transactions are not substantial. Evidence of connection of the defendant to the Aime transaction is almost completely absent.

The introduction of evidence of the Aime transaction would be highly prejudicial to the defendant. Such evidence cannot be admitted.

Relation of DaRonch and Smith Transactions:

The Court has considered the People's argument that the Carol DaRonch and Melissa Smith transactions ought also be considered in connection with the admissibility of evidence of the Kent and Aime transactions.

The People's argument with respect to DaRonch is predicated in large part upon the use of a ruse to cause Ms. DaRonch to accompany her assailant voluntarily. As discussed above in connection with the Kent transaction, there is no indication that a ruse was used in Kent's disappearance. There is only suspicion to connect the person, if any, involved in Kent's disappearance with the person who attempted to employ a ruse on two witnesses at the Viewmont High School in an effort to have them accompany him to his car outside the high school. The only other significant tie between DaRonch and Kent is that a handcuff key fitting the handcuffs used in the DaRonch abduction was found on the school grounds from which Kent disappeared. The District Attorney conceded on oral argument that such key would fit other handcuffs of the same make. There is no indication in the offer of proof whether the policemen who conducted the grid search which resulted in discovery of the handcuff key used handcuffs of such make. At most, the handcuff key raises a suspicion that the defendant was present at Viewmont High School on the night of Kent's disappearance. The presence of defendant at that location was found insufficient, in analyzing the similarity of the Kent and Campbell transactions, to establish defendant's connection to any crime that might have been committed with respect to Kent.

The Court has also considered the People's argument that the Aime transaction and the Melissa Smith transactions are similar

and that the Campbell transaction can be tied to Aime through Smith. Without reviewing the similarities between Smith and Aime in detail, there are significant similarities in the condition of the body, use of a nylon stocking and the absence of clothing in the area of the body. Smith has one additional link to the defendant not possessed by the Aime case. A pubic hair was found in a Volkswagen confiscated from a person who had purchased that vehicle from the defendant. The People's expert has testified at the preliminary hearing that such hair exhibits the same microscopic characteristics as known pubic hairs of Melissa Smith. He has also testified that microscopic hair identification does not constitute a positive basis for personal identification and that no statistical data exists with respect to the incidence of such characteristics in the population of any area. Thus, he was unable to state the mathematical probability that hair samples having the same microscopic characteristics are from the same individual. Even if a positive identification could be made, there is still a large gap to be bridged between showing that Smith was at one time in a vehicle owned by defendant and showing that defendant was responsible for her death.

No case has been cited where a two-step approach to establishing similarity of transactions has been permitted. In view of the highly prejudicial nature of the Aime transaction and the inconclusive tie of the Smith transaction to the defendant and the necessarily uncertain process of deciding whether the Smith transaction and the Aime transaction are truly similar to each other, it is concluded that use of the Aime transaction as a similar transaction to the Campbell transaction cannot be permitted on the basis of this form of analysis.

A separate Order is being entered based on this Memorandum Opinion.

On the Court's own motion, this Memorandum Opinion is
ordered sealed.

Done this 4 day of November, 1977.

BY THE COURT:


District Judge